

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

HONORABLE GEORGE CARAM STEEH

v.

No. 15-20652

ARLANDIS SHY, II,

Defendant.

MOTION HEARING

Monday, June 4, 2018

- - -

APPEARANCES:

For the Government:

MARGARET SMITH, ESQ.  
Assistant U.S. Attorney

For the Defendant:

MARK MAGIDSON, ESQ.

- - -

*To Obtain Certified Transcript, Contact:*  
*Ronald A. DiBartolomeo, Official Court Reporter*  
*Theodore Levin United States Courthouse*  
*231 West Lafayette Boulevard, Room 1067*  
*Detroit, Michigan 48226*  
*(313) 962-1234*

*Proceedings recorded by mechanical stenography.*  
*Transcript produced by computer-aided transcription.*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

	<u>Page</u>
Motion Hearing	3

E X H B I T S

<u>Identification</u>	<u>Offered</u>	<u>Received</u>
-----------------------	----------------	-----------------

N O N E

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Detroit, Michigan  
Monday, June 4, 2018

- - -

**THE CLERK:** Case Number 15-20652, United States versus Arlandis Shy. You may be seated.

**THE COURT:** Good morning.

**MR. MAGIDSON:** Good morning, your Honor.

**MS. SMITH:** Good morning, your Honor. Maggie Smith and Julie Finocchiaro on behalf of the United States.

**THE COURT:** Welcome.

**MR. MAGIDSON:** Mark Magidson and John Theis on behalf of Mr. Shy who is seated counsel table.

**THE COURT:** Welcome. All right. This matter is before the Court on the defendant's motion.

Would you like to address it, Mr. Magidson?

**MR. MAGIDSON:** Yes, Judge.

Briefly, Judge -- and I know the Court has had an opportunity to read my motion and the government's response -- and here's the problem in a nutshell.

This case has been pending, as the Court knows, for a substantial period of time, and then -- I don't know. It's been like a week or 10 days ago -- I received a call from the U.S. Attorney and said, by the way, did I

1       ever give you your client's Facebook account? I said no,  
2       not really. I mean, over the course of the past year,  
3       I've gotten all of the co-defendants, and I've tried to  
4       plow through voluminous amounts of material there, just  
5       really a lot of stuff, and he said, well, there was an  
6       oversight or something. We thought we had given it to  
7       you. We just informed you that we have it. We're going  
8       to send it to you, and they did, and it came promptly at  
9       that point, and it is roughly give or take -- roughly  
10      6,000 pages of documents, and that was overwhelming in my  
11      opinion because the -- to go through all of that.

12               Now I've gone through parts of it, and I've seen  
13      certain things, and gleaned certain things, and things  
14      frankly that I wish I had known before, because had I  
15      known those before, I might have approached things  
16      differently than I had been with my client, with the  
17      government, negotiations, things like that. I mean,  
18      things that I thought were not going to potentially be  
19      incriminating to my client, and now I have some of these  
20      things of concern to me.

21               So the government says well, it's no big deal. No  
22      harm, no foul, but -- and I'm not -- I don't have  
23      evidence. I don't claim they did it as a deliberate  
24      tactic. I mean, this is a large case. You know, to keep  
25      this large -- with all of these defendants, to keep it all

1 organized, things fall through the cracks. So I don't say  
2 it is a deliberate intent. I don't have any evidence of  
3 that. There's an error, but with substantial consequences  
4 to the defense, and that's my concern.

5 And so the government says, we've listed things on  
6 our exhibit list that we think we might use, and it may be  
7 somewhat incriminating. We're going to give you some of  
8 these things. You can infer some of the bad things.

9 That may be true, but that doesn't help me get  
10 into the crux of it. I mean, maybe there is exculpatory  
11 material that I can use to benefit my client. We got some  
12 bad stuff. I mean, we've got a photograph. Standing  
13 alone you may say, oh my God. That's terrible, but it may  
14 be connected with another document buried in the other  
15 5,999 pages that could explain that.

16 So I have -- I think as a defense lawyer, I have a  
17 duty to plow through these volumes, and in a typical case,  
18 a typical single defendant case, you might have five,  
19 three, 400 pages of discovery, maybe less than that. A  
20 gun case, drug case, 150 pages. I had a robbery case  
21 involving a phone dump of 3,000 pages, and the court  
22 granted extra -- an expert for me to help analyze this and  
23 go through some of this stuff in a different case.

24 So now I got 6,000 pages on the eve of trial that  
25 I think ethically requires me to go through to see if

1       there is any exculpatory material because we know there's  
2       inculpatory stuff. The government has indicated so, and  
3       I've actually plowed through a little bit of it and found  
4       stuff that I shared with Mr. Theis today that I found last  
5       night that is disturbing.

6                   **THE COURT:** Disturbing how?

7                   **MR. MAGIDSON:** It's disturbing that I didn't  
8       have it beforehand, in terms of the government using the  
9       material against my client, and maybe -- who knows, maybe  
10      there's a basis for me to keep it out. Maybe there's  
11      motions to be filed. I have not researched all of this.

12                  So that's the reason for the motion. I filed it.  
13      We set forth the standards. The Court has authority, and  
14      I asking to preclude this, any use of it. The Court has  
15      discretion. The Court can consider the reasons for the  
16      government's delay, the prejudice to the defendant, and  
17      whether there's a less severe sanction that's appropriate  
18      and the other relevant circumstances. I've cited that in  
19      the case law, and I think we're in agreement on that.

20                  The reasons for delay, it wasn't caused by the  
21      defendant, and again, I don't have any evidence that it  
22      was deliberate. On the other hand, the government  
23      acknowledges that there was an oversight, something they  
24      forgot about us.

25                  Secondly, the prejudicial --

1                   **THE COURT:** I think it was a little more than  
2                   that. They didn't recognize that there was a body of  
3                   evidence applicable to your client's Facebook.

4                   **MR. MAGIDSON:** Well, I think the agent had it  
5                   all along, or they knew about it. There was something  
6                   that the dots didn't connect.

7                   **THE COURT:** Right.

8                   **MR. MAGIDSON:** It wasn't recently discovered.  
9                   They had it for a period of time. Somebody did. The  
10                  agent, they didn't communicate, or wasn't made known to  
11                  the government.

12                 Prejudice to the defendant I think is substantial  
13                 for the reasons that I've indicated, and -- and I believe  
14                 that given the lateness of the hour that the appropriate  
15                 remedy would be preclusion.

16                 Now the government responds by saying well, you  
17                 know, the trial doesn't actually start until the 18th. So  
18                 I've got time to, you know, start peeling these levels of  
19                 the onion to get to the core. That's sounds good. It is  
20                 a reasonable argument, except every day -- I shouldn't say  
21                 every day -- but we've gotten Jencks material coming in  
22                 fast and furious, and I've been trying to plow through all  
23                 of that. It's one thing after another. The day that I  
24                 think I'm almost caught up, here come another, and so last  
25                 evening Chris Anton sent out at 10:00 another bunch of

1 Jencks material production 45, 50, whatever amount of it  
2 was.

3 So this will be continuing as the trial  
4 progresses, and so I'm trying to maintain and getting all  
5 of this new Jencks material and things, and still try to  
6 follow through of what I could have had the past year I  
7 think.

8 **THE COURT:** Okay.

9 **MR. MAGIDSON:** Thanks, Judge.

10 **THE COURT:** Ms. Smith?

11 **MS. SMITH:** Good morning. Just from a  
12 factual basis, I think it is worth noting that it is the  
13 defendant's own Facebook account. So I think the person  
14 who is in the best position to know what's in that account  
15 is probably the defendant himself, more than we would  
16 because it is his account.

17 Notwithstanding for the record, I think we put  
18 this in the brief, on the 18th of May, this Facebook  
19 returned was passed over to the defendant, and then on the  
20 30th of May, we marked what exhibits we intend to use at  
21 trial from his Facebook account, and sent them over to the  
22 defense along with the search warrant and application and  
23 affidavit itself.

24 Opening statements as I understand it is to begin  
25 on the 18th of June, and this defendant's Facebook



1 evidence isn't expected to be introduced to the jury until  
2 towards the end of July. So we're looking at  
3 approximately seven weeks from the time that he received  
4 the Facebook account until it will be utilized at trial.

5 So defense counsel is correct about Rule 16 and  
6 the remedies. The reason for the delay I think we both  
7 agree. It's not anything that's bad faith. It just  
8 happened to be an error in accumulation of the evidence,  
9 and giving that over, and that's an important part in the  
10 process of determining what would be an effective remedy  
11 to cure this situation.

12 I wanted to point out two Sixth Circuit cases that  
13 I found that are on point. The first is United States  
14 versus Naples, which is 60 F3d at 244, and that's a Sixth  
15 Circuit Court of Appeals case where the court reversed the  
16 decision of the district court where the district court  
17 suppressed evidence as a remedy for an alleged discovery  
18 violation.

19 And in that case the Sixth Circuit noted that the  
20 evidence had been turned over approximately seven weeks  
21 before trial, and just like here, and the Court -- the  
22 panel in that Sixth Circuit case found that we ought to be  
23 looking at the least severe remedy when looking at  
24 discovery issues.

25 And then there's the United States versus Glover,

1 which is a Sixth Circuit case cited at 846 F2d 339, 1988  
2 case. In that case the evidence that was not turned over  
3 was not turned over even in time for trial, and the Sixth  
4 Circuit found that suppression was not a remedy,  
5 particularly because the defendant failed to ask for  
6 continuance.

7 So when we look at what do we do here, 6,000 pages  
8 of evidence, and we are literally today on the eve of  
9 trial, but we know the reason for the delay. It was not  
10 anything in bad faith. The degree of prejudice to the  
11 defendant is something that the Court is going to  
12 consider.

13 In terms of being able to negotiate a plea, as we  
14 pointed out, we were never in a position to negotiate a  
15 plea until the 14th of May, and it's my understanding that  
16 it's unlikely that this defendant will enter into a plea  
17 before trial.

18 In terms of having an opportunity for any grounds  
19 to suppress, the government is not going to object if the  
20 defendants decides that they want to file a motion to  
21 suppress based on the Facebook search warrant, and he  
22 would have until really -- the Court could fashion a date  
23 for that motion cut off, and would not object to that.

24 The other issue that was brought up is that it is  
25 unclear as to what charges the Facebook results were

1 pointing towards, and that was also answered in the  
2 response, that it goes towards the RICO conspiracy count.

3 So the last factor here is what extent can the  
4 prejudice be cured? Well, he's not asking for a  
5 continuance of trial, which is the first step in the  
6 remedy afforded in a situation like this. So because he  
7 doesn't want to exercise that remedy, does not mean we go  
8 to the more severe punishment of suppression of evidence.

9 This Court issued an opinion on the 24th of May  
10 denying the government's request for continuance of trial,  
11 and kind of laid out all of the time that the parties have  
12 to continue to prepare for trial, and to utilize their  
13 resources in half day trials, the break between jury  
14 selection and the beginning of trial.

15 And so for all of these reasons, your Honor, we  
16 believe that this evidence should be admitted at trial.

17 **THE COURT:** Okay. Thank you.

18 I know that the government has identified the  
19 information it intends to elicit at trial from the 6,000  
20 pages, and that amounts to 100 pages or 92.

21 **MS. SMITH:** I think 92 and 11 videos, and the  
22 videos are of short duration.

23 **THE COURT:** And so Mr. Magidson, you and Mr.  
24 Theis had a chance to review those materials to assess the  
25 evidentiary value in your client's position?

1                   **MR. MAGIDSON:** I have not, your Honor. At  
2 this point I have not been able to look at those as of  
3 yet. I certainly will. I should --

4                   **THE COURT:** You've had that for how long now?

5                   **MS. SMITH:** Your Honor --

6                   **MR. MAGIDSON:** I had it on May 30th. So a  
7 few days.

8                   **THE COURT:** Okay.

9                   **MR. MAGIDSON:** And I just printed out -- my  
10 client came from Milan. So I printed out some of the  
11 things, and one of the things that I thought was going to  
12 be applying to him is a Facebook entitled "Grymee the  
13 Shooter," and it has some commentary. It sounded  
14 terrible, Grymee the Shooter, because his nickname, alias  
15 if you will, is Grymee, but he tells me there are two  
16 Grymees, and I have to explore this. This is where all of  
17 a sudden this becomes an issue. I don't know if they got  
18 right stuff. There's other things I have to explore.

19                   **THE COURT:** Okay. All right. Thank you.

20                   Well, I think the parties have agreed on the  
21 general principles that apply to the late discovery  
22 disclosures in this case, and it does appear to be  
23 uncontested that the materials were overlooked, and  
24 unknown to the government for a considerable period, and  
25 as soon as it was discovered, was delivered and defense

1 counsel was notified.

2 So the Sixth Circuit has indicated in Naples,  
3 which is cited by the government, that suppression of  
4 evidence must be viewed as an undesirable remedy reserved  
5 for those cases of incurable prejudice or bad faith  
6 conduct, demanding punishment by the court.

7 Well, bad faith conduct is not at issue here, but  
8 incurable prejudice is something that needs to be  
9 considered by the Court.

10 In this case any prejudice that results to the  
11 defendant by use of these materials is, or just the  
12 defense counsel's inability to review all of the materials  
13 is based on the imminent trial and all of the other  
14 materials that are described by Mr. Magidson as coming in  
15 day-to-day requiring review.

16 If the defendant requested an adjournment of  
17 this case, it would likely get scheduled with the other  
18 cases which we're hoping for trial in October. So it  
19 would be a matter of a few months before the defendant's  
20 trial would take place if the defendant opted to accept  
21 delay of the trial, and there are remedies that the Court  
22 would be happy to consider if asked by defense counsel to  
23 be considered for a remedy of the situation.

24 So one of those would be to appoint an  
25 additional attorney to focus primarily on the 6,000 page

1 set of documents, and of course, in preparation in  
2 general, Mr. Shy has the advantage of two lawyers. The  
3 Court did grant his motion to permit learned counsel to  
4 continue in assistance for all of the issues addressed in  
5 the trial. But even with that addition, the Court would  
6 consider another party to focus on this discovery and  
7 assistance to defense counsel in getting prepared.

8 That, combined with the amount of time that's  
9 built into our schedule for prep, that is ending the day  
10 at 1:00 in the afternoon so the balance of the day is  
11 available, taking two full weeks off during the course of  
12 the trial at intervals that would allow defense counsel --  
13 especially defense counsel would have additional  
14 assistance of another lawyer to develop, those things I  
15 think are a likely and effective remedy for the problem  
16 that's developed here.

17 If this was done in bad faith, that would be a  
18 different story, but it's pretty clear that it is not, and  
19 the Court is constrained to conclude as in Naples that the  
20 suppression of evidence under the circumstances is an  
21 undesirable remedy, and not necessary, because again, I  
22 realize Mr. Shy has been waiting a long time for his  
23 trial, and that it is his desired to go forward, but --  
24 and it's his life. I think he's bright enough to  
25 recognize where he is situated here, and if the request

1 was made for me to continue the trial, I would absolutely  
2 do that as a remedy in his case. But in the absence of  
3 that, I can't think of anything else other than appointing  
4 a lawyer to assist specifically in that connection, and --  
5 well, other than, there's nothing else to be said.

6 **MR. MAGIDSON:** I did consult, again with Mr.  
7 Shy just now as to whether he would want to consider an  
8 adjournment, and he said, as he has all along, he's very  
9 firm that he wants to maintain his speedy trial rights,  
10 and sooner than later.

11 The only other thing that I would ask the Court is  
12 if we get into this and find some that there are some  
13 grounds, some motions to proceed on -- there's been  
14 mentioned of dual Grymees out there -- I would like to  
15 keep that option open.

16 **THE COURT:** Right. This is all, as it stands  
17 now, the expectation is that material might be used by the  
18 government as of the end of July?

19 **MS. SMITH:** Yes, your Honor.

20 **THE COURT:** And depending on your progress,  
21 I'm assume you would like the Court to appoint an  
22 additional attorney to focus on this?

23 **MR. MAGIDSON:** An additional attorney or even  
24 a paralegal. I can discuss it with co-counsel, and see  
25 what is the best use of time.

1                   **THE COURT:** Yes. All right. I'm happy to  
2 provide that as part of the remedy.

3                   **MR. MAGIDSON:** I appreciate it.

4                   **THE COURT:** But in terms of your ability to  
5 challenge the use of some aspect of the discovery to seek  
6 suppression, I heard the government agree that that would  
7 be appropriate to reserve that opportunity. We need to  
8 establish a cutoff date.

9                   **MS. SMITH:** Yes, your Honor.

10                  **THE COURT:** So what would you propose?

11                  **MS. SMITH:** I think since we don't anticipate  
12 introducing evidence until mid-July -- I don't know what  
13 day of week -- like the 15th or 18th of July, somewhere  
14 along that line so that the Court would have the  
15 opportunity to hear whatever motions might be filed as it  
16 relates to the Facebook account.

17                  **THE COURT:** Okay. So we'll make it -- we  
18 will give Mr. Magidson and Mr. Theis an opportunity to  
19 file -- I'm thinking the second week of July, early in the  
20 second week.

21                  **MS. SMITH:** That's sounds right. If it's a  
22 motion to suppress based on the search warrant, then  
23 perhaps they would let us know that they are going to file  
24 something of nature, but motions in limine based on  
25 evidentiary, I think that the mid-July date will work.



1                   **THE COURT:** Okay. So perhaps the 10th of  
2 July, which is a Tuesday.

3                   **MS. SMITH:** That will be fine.

4                   **THE COURT:** All right. That will be the  
5 ruling as it relates to this motion in limine.

6                   Is there anything else that we needs to address?

7                   **MR. MAGIDSON:** Nothing further from the  
8 defense, your Honor.

9                   **MS. SMITH:** Not from the United States.  
10 Thank you.

11                   **THE COURT:** Okay. We'll let you get back to  
12 work.

13                   **MS. SMITH:** Thank you, your Honor.

14                   **MR. MAGIDSON:** Thank you, your Honor.

15

16                   (Proceedings concluded.)

17                   - - -

18                   **C E R T I F I C A T I O N**

19                   I, Ronald A. DiBartolomeo, official court  
20 reporter for the United States District Court, Eastern  
21 District of Michigan, Southern Division, appointed  
22 pursuant to the provisions of Title 28, United States  
23 Code, Section 753, do hereby certify that the foregoing is  
24 a correct transcript of the proceedings in the  
25 above-entitled cause on the date hereinbefore set forth.

1 I do further certify that the foregoing  
2 transcript has been prepared by me or under my direction.  
3  
4

5 s/Ronald A. DiBartolomeo

December 3, 2019

6 Ronald A. DiBartolomeo, CSR  
7 Official Court Reporter

Date

- - -

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25